

Request for Rule Waiver

The State of South Dakota (South Dakota), in accordance with Sections 1.3 and 1.925¹ of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully requests the Commission waive the requirements of Section 90.35(a)² of its Rules and Regulations to permit the operation of Industrial/Business channels 157.500 MHz, 150.845 MHz and 150.950 MHz (the "Channels") as part of South Dakota's trunked VHF system in Pine Ridge, South Dakota.

Background

South Dakota currently the South Dakota Interagency Communications System -- a VHF, statewide, interoperable, digital trunked public safety radio system ("System") to provide communications coverage and support for public safety operations in various locations throughout the state of South Dakota. The System is comprised of VHF public safety trunked licenses as well as Paging and Radiotelephone (CD) licenses and VHF Public Coast auctioned spectrum.

The System is one of the most highly integrated public safety systems in the U.S. and is a model for successful network interoperability between first responders and other personnel at the local, state, and federal level. The System is critical to the protection of life, safety, and property in South Dakota.

The System, which has been active since October 23, 2002, consists of 296 voice repeaters deployed at 52 tower sites located throughout South Dakota. The System is operated by a network controller located in Pierre, South Dakota and includes three state dispatch centers staffed by 13 console operators. Upward of \$50 million has been spent constructing the System.

The System is available for use by any governmental agency with public safety ties operating in South Dakota. Currently, approximately 22,590 radios capable of operating on the System are distributed to public safety agencies throughout the state. Approximately 4,983 of those radios are distributed to state agencies, 14,815 to local agencies and 1,078 to federal agencies. Almost 1,380 additional radios have been distributed to the Bureau of Indian Affairs and state tribes. The remaining approximately 335 radios are assigned to a mixture of other public safety users.

The System is used to support a variety of public safety operations. The entities that have been issued radios for operating on the System include 232 Fire departments, 107 Police departments, 65 Sheriff's departments, all ambulance/EMS and emergency care medical facilities in the state through the Department of Health, and all Emergency Managers.

¹ 47 C.F.R. §§ 1.3, 1.925.

² 47 C.F.R. § 90.35(a).

The intelligent radios operating on the System allow for inter-agency interoperability or, if desired allow individual agencies to maintain private communications via intra-agency "talk groups". The System is heavily relied upon by public safety and users placed 2,512,818 calls during the month of August 2012 alone.

In addition, the System has become a regional standard for other states seeking to develop interoperable public safety networks. The State has worked with the states of Wyoming, North Dakota, Nebraska (including four local governments), Montana, and a number of Minnesota counties regarding similar systems, particularly to improve communications for first responders who share medical, law enforcement, and fire resources across state borders. These states are in various stages of developing compatible networks. Wyoming and North Dakota, for example, are each implementing VHF digital radio networks that will be compatible with South Dakota's System.

South Dakota continues to implement sites and expand the System as necessary to support its public safety mission. In that regard, to support its operations in Pine Ridge, South Dakota is filing an application to use several public safety channels as well as Industrial/Business channels 157.500 MHz, 150.845 MHz and 150.950 MHz to provide sufficient and continuous communications coverage for the licensed area. Due to limited channel reuse and interoperability concerns for the existing trunked VHF system and the proximity to the State of Nebraska's existing trunked VHF public safety system, the Channels are the only available option for expanding coverage for Pine Ridge. South Dakota respectfully requests the Commission waive its generally applicable rules governing eligibility so that the state may include Industrial/Business assignments generally available under Section 90.35(a) of the Commission's rules.

Request for Waiver of Section 90.35(a)

Section 1.3 of the Commission's regulations allows the agency to waive its rules "for good cause shown."³ A waiver may be granted if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest" better than adherence to the general rule.⁴ Alternatively, Section 1.925 provides the agency with authority to waive its rules if a petitioner establishes that the "underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest." Section 1.925 also permits a waiver to be granted if unique or unusual factual circumstances exist causing the application of the rule to be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁵

The flexibility of the waiver process is supported by the Court of Appeals for the D.C. Circuit, which has previously stated that waiver allows the Commission to "maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility."⁶ In deciding whether or not to grant specific waiver requests, the Commission must

³ 47 C.F.R. § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("*WAIT Radio*").

⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁵ 47 C.F.R. § 1.925.

⁶ *WAIT Radio*, 418 F.2d at 1159.

“take into account consideration of hardship, equity, or more effective implementation of overall policy” in its broader quest for regulation in the “public interest.”⁷ The Wireless Bureau has applied this authority to grant a number of requests similar to South Dakota’s, such as those made by the States of New Hampshire and Wyoming, to “ensure that public safety agencies have sufficient spectrum.”⁸

The Lack of Available Public Safety Channels Requires South Dakota to Seek Alternative Spectrum Options

South Dakota has determined it will need several additional channels to expand its operations in Pine Ridge. The State researched the availability of VHF channels in the Public Safety pool allocated under Part 90 and has applied for all such channels that it determined can be used in its proposed system. Pine Ridge is located in the southern portion of the state, along the border with Nebraska. The state of Nebraska also operates a trunked VHF public safety radio system along the border. Because of potential radio interference with Nebraska’s neighboring system, South Dakota is unable to obtain a sufficient number of channels from the Public Safety pool to accommodate its spectrum needs for the licensed area. Essentially, South Dakota has exhausted its options for Public Safety pool Part 90 frequencies.

Because of the shortage of Public Safety pool channels, South Dakota acquired multiple VHF channels allocated under the Part 22 Paging and Radiotelephone Service band and the Part 80 VHF Public Coast band through the Commission’s Auction process. The State has spent significant time and resources developing and deploying its auctioned spectrum to provide communications coverage throughout the State. There are, however, limited channels available for re-use in this area due to the frequency plan and channel use in neighboring areas and interoperability concerns for the existing trunked system.

For these reasons, South Dakota was forced to research additional VHF spectrum options to integrate into the existing system. The Channels proposed in this request will provide South Dakota with the necessary spectrum to support its communications network and provide adequate coverage for public safety entities in responding to emergency situations. South Dakota submits that the state has exhausted its spectrum operations and has no reasonable alternative to use of the Industrial/Business channels for its system in Pine Ridge. South Dakota requests the Commission waive the eligibility requirements to permit the authorization of these Part 90.35 channels. The Commission’s grant of the instant request would provide South Dakota with the necessary VHF spectrum required for effective service coverage.

Grant Of South Dakota’s Waiver Under Sections 1.3 and 1.925 Is In the Public Interest

Grant of South Dakota’s request would serve long-standing policy objectives of the Commission, particularly the deployment of spectrum to meet public safety needs, the efficient utilization of scarce spectrum and maximizing interoperability among agencies and departments

⁷ *Id.*

⁸ See, e.g., *Application of the State of New Hampshire and McCormick & Jacobson*, Memorandum Opinion and Order, 14 FCC Rcd. 3607 (1999) (“*New Hampshire Waiver Order*”) and *State of Wyoming, Request For Waiver of Sections 90.20(g)(2)(i) et al.*, Order, 23 FCC Rcd. 10310 (2008) (“*State of Wyoming Order*”).

responsible for public safety. In addition, the grant of South Dakota's request would not frustrate the underlying purpose of the Commission's licensing scheme for these mobile radio assignments. The Commission has stated on numerous occasions that one of its "primary goals" is "to provide for the communications needs of the public safety community."⁹ That goal can be found in Section 1 of the Communications Act, which lists as a core purpose of the Commission "promoting safety of life and property through the use of wire and radio communication."¹⁰

Additionally, the Commission has repeatedly acknowledged that the development of public safety systems is in the public interest, and that waivers are an appropriate means to enable such systems. For example, in 2008 the Commission granted 57 applications and associated waiver requests filed by the City of Los Angeles to operate public safety communications on all frequencies in the television Channel 15 band (476-482 MHz).¹¹ The Commission granted the City's request because "the Los Angeles public safety community relies on this band to a far greater extent than almost any other region; Los Angeles requests these frequencies as the core of an extensive regional system."¹² South Dakota's VHF system will be used by various state and local entities, all utilizing equipment that operates on the VHF spectrum upon which the system is based.

The Commission has granted similar waiver requests in circumstances in which it finds the requested frequencies promote interoperability between public safety agencies. For example, the City of Burbank's waiver request sought authority to operate a public safety radio system utilizing UHF assignments that would be interoperable with other public safety agencies participating in an interagency communications interoperability system.¹³ In granting Burbank's request, the Commission found that the City's current system was so overcrowded and congested that the City needed "access to additional spectrum in order to promote effective public safety communications."¹⁴ In particular, the Commission has granted Public Safety entities limited waivers of the eligibility restrictions under Section 90.35(a) so that Industrial/ Business assignments could be assigned to meet pressing Public Safety requirements.¹⁵ Without adequate spectrum, the South Dakota's VHF system will become congested and overcrowded by multiple users and over used channels, impairing the ability of the System to meet its objectives. The instant requests would allow the Commission to assign unused spectrum to support South Dakota's operations.¹⁶

⁹ *State of Florida, Request for Waiver of the Commission's Rules to Permit Licensing of Stations in 800 MHz General Category on Non-standard Channel Centers*, Memorandum Opinion and Order, 16 F.C.C. Rcd. 2174, 2179, ¶13 (2001) ("State of Florida Order").

¹⁰ 47 U.S.C. § 151.

¹¹ *County of Los Angeles, California, Request for Waiver of the Commission's Rules to Authorize Public Safety Communications in the 476-482 MHz Band*, Order, 23 FCC Rcd 18389 (rel. Dec. 30, 2008).

¹² *Id.*

¹³ *See, Application of City of Burbank, CA, File No. 0001073667*, Memorandum Opinion and Order, 18 F.C.C.R. 23770, 23771 (rel. Nov. 12, 2003).

¹⁴ *Id.* at 23772.

¹⁵ *See State of New Hampshire Order* at ¶18.

¹⁶ *See, e.g., City of Summit, NJ, File No. 0001869696, Order*, 20 F.C.C.R. 16181 (waiver requested under Section 337(c) and 1.925; waiver granted under former). *See also, Maritel, Inc., Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses, Memorandum Opinion and Order*, 22 F.C.C.R.

Finally, the Commission has frequently noted that two of its “primary goals are to provide for the communications needs of the public safety community and promote the interoperability among public safety entities.”¹⁷ The Commission could accomplish both of these goals by granting the requested waiver.

CONCLUSION

In light of the foregoing, South Dakota respectfully submits it has satisfied the requirements for a waiver under Sections 1.3 and 1.925 of the Commission’s rules in order to operate on assignments not generally available to Public Safety entities and hereby requests the Commission waive the eligibility requirements of Section 90.35(a).

Should the Commission require additional information, it is asked to contact the State’s telecommunications counsel: Greg Kunkle (202-434-4178; kunkle@khlaw.com) Keller and Heckman LLP, 1001 G Street NW, Washington, DC 20001.

14074 at ¶22 (*rel.* July 24, 2007) (The Commission noted that it would not serve the public interest to “allow spectrum to remain fallow for such a lengthy period of time.”).

¹⁷ *State of Florida Order* at ¶13.